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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/787,334	02/26/2004	Jason P. Adams	2456.2.14	3985
28049	7590	01/18/2008	EXAMINER STULII, VERA	
PATE PIERCE & BAIRD 175 SOUTH MAIN STREET, SUITE 1250 SALT LAKE CITY, UT 84111			ART UNIT 1794	PAPER NUMBER
		MAIL DATE 01/18/2008	DELIVERY MODE PAPER	

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/787,334	ADAMS, JASON P.
	<b>Examiner</b>	<b>Art Unit</b>
	Vera Stulii	1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 14 November 2007.
- 2a) This action is FINAL.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-22 and 47-61 is/are pending in the application.
  - 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-22 and 47-61 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
    - a) All    b) Some \* c) None of:
      1. Certified copies of the priority documents have been received.
      2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
      3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)          | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 112***

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-22 and 47-61 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 1 is rendered indefinite for the recitation of the phrase "an amount effective to increase nutritional constituents otherwise subject to a deficiency in a user". The terms "effective to increase", "subject to a deficiency in a user" are relative terms which render the claim indefinite. The metes and bounds of the claimed invention are unclear. Furthermore with regard to "deficiency in user", one is trying to define a composition by situation and subject that is not a part of invention. Furthermore, there appears to be no distinction or way to determine the difference between added amounts of ingredients and those already present. The terms "effective to increase", "subject to a deficiency in a user" are not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention.

The recitation of a selection from a group of elements in a claim should comply with accepted U.S. Patent practice with regard to the recitation of Markush grouping of claim elements. Phrases using "comprising" are open sets,

and should recite elements in the alternative (i.e. "comprising A, B, C or D"), whereas closed sets ("consisting of") should recite elements as "selected from the group consisting of A, B, C and D." See at least claims 12, 21, 54 and 61.

In regard to claims 10 and 11, it is noted that the source of the ingredient whether previously present or later added does not materially effect the composition per se.

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

**Claims 1-22, 47-50 and 54 are rejected under 35 U.S.C. 102(b) as being anticipated by Lee Jae Hack (KR20010069765) hereinafter Hack.**

In regard to claims 1, 47 and 49, Hack discloses a liquid beverage directly ingestible by user (beer) (Abstract).

In regard to claims 1, 5-7, 10-11, 47, 50 and 54, Hack discloses active ingredients present in the beverage such as vitamins A, B<sub>1</sub>, B<sub>2</sub>, B<sub>6</sub>, C, D, E and calcium (Abstract).

In regard to claims 1, 12, 13 and 47, Hack discloses antioxidant (vitamin C) as a "chemical excipients" (Abstract). It is noted that Vitamin C was known to function as a highly effective antioxidant.

In regard to claims 2 and 9, Hack discloses commercially available traditional drink (beer) (Abstract).

In regard to claims 3, 4, 14 and 49, Hack discloses beer (Abstract).

In regard to claim 8, Hack discloses calcium (Abstract).

In regard to claims 15 and 21-22, Hack discloses beer containing vitamins and calcium (Abstract).

In regard to claims 16-20, Hack discloses beer containing vitamins and calcium (Abstract). Hack also discloses providing "nutrients that are usually deficient in the human body" (Abstract). On page 6 of specification Applicant recites that "[n]utritional deficiency may result from numerous mechanisms and may include, (1) ingestion of foods and beverages that are themselves nutritionally deficient; (2) ingestion of foods and beverages that may deplete nutrient stores in the body; (3) ingestion of foods and beverages that may interfere with the absorption of nutrients in the gastrointestinal system; and (4) co-morbidity with diseases, disorders, or conditions that may deplete nutrient stores in the body. Alcohol, especially chronic, excessive intake of alcoholic beverages, may cause nutritional deficiency through any or all of the above listed mechanisms." Combining alcohol with vitamins, antioxidant and mineral, leads to replenishing a deficiency of selected nutrients, inhibiting the depletion effects of the beverage on nutrients, reversing the depletion effects of the beverage on nutrients, neutralizing depletion effects of the beverage on nutrients, etc.

Regarding specific amounts nutritional ingredients and claim 48, Hack disclose 500 mg of calcium, 150 µg of vitamin A, 1 mg of vitamin E, 0.3 mg of vitamin B<sub>1</sub>,

0.4 mg of vitamin B<sub>2</sub>, 0.65 mg of vitamin B<sub>6</sub>, 1.25 µg of vitamin D, 20 mg of vitamin C.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

**Claims 1-22, 47-52, 54-59 and 61 are rejected under 35 U.S.C. 102(a) as being anticipated by Donhowe (US 2003/0134007).**

In regard to claims 1, 47, 49 and 55, Donhowe discloses a liquid beverage directly ingestible by user (malt beverages, beer, wine or distilled alcoholic beverages) (Abstract).

In regard to claims 1, 5-8, 10-11, 47, 50-52, 54, 56-59 and 61, Donhowe discloses active ingredients present in the beverage such as protein, amino acids, minerals (iron, calcium, zinc and selenium), vitamins (Vitamin A, Vitamin E, Vitamin C, Vitamin B1, Vitamin B2, Vitamin B6, and Vitamin B12) [0017].

In regard to claims 1, 12, 13 and 47, Donhowe discloses antioxidants (Vitamin C, Vitamin E and selenium), sweeteners, preservatives (sodium benzoate) and food coloring [0017], buffering agents such as citric acid, tartaric acid, malic acid, succinic acid, ascorbic acid, phosphoric acid, potassium phosphate and/or sodium phosphate (claim 10).

In regard to claims 2, Donhowe discloses commercially available traditional drink (malt beverages, beer, wine or distilled alcoholic beverages) (Abstract).

In regard to claims 3, 4 and 14-15, Donhowe discloses malt beverages, beer, wine or distilled alcoholic beverages) (Abstract).

In regard to claim 9, Donhowe discloses potassium phosphate and sodium phosphate (claim 10).

In regard to claims 16-20, Donhowe discloses beer containing vitamins and calcium (Abstract). Hack also discloses providing "nutrients that are usually deficient in the human body" (Abstract). On page 6 of specification Applicant recites that "[n]utritional deficiency may result from numerous mechanisms and may include, (1) ingestion of foods and beverages that are themselves nutritionally deficient; (2) ingestion of foods and beverages that may deplete nutrient stores in the body; (3) ingestion of foods and beverages that may interfere with the absorption of nutrients in the gastrointestinal system; and (4) co-morbidity with diseases, disorders, or conditions that may deplete nutrient stores in the body. Alcohol, especially chronic, excessive intake of alcoholic beverages, may cause nutritional deficiency through any or all of the above listed mechanisms." Combining alcohol with vitamins, antioxidants, minerals, proteins and amino acids leads to replenishing a deficiency of selected nutrients, inhibiting the depletion effects of the beverage on nutrients, reversing the depletion effects of the beverage on nutrients, neutralizing depletion effects of the beverage on nutrients, etc.

In regard to claims 21-22, Donhowe discloses malt beverages, beer, wine or distilled alcoholic beverages containing fructose, corn syrup, sucrose, honey, glucose, sucralose, aspartame, stevia (claim 8), calcium, zinc and iron (claim 14), whey, casein, soy protein, rice protein, albumin, hydrolyzed protein (claim 1).

Regarding specific amounts nutritional ingredients and claim 48, Donhowe discloses 10% to 100% of the U.S. Recommended Daily Value of vitamins (Vitamin A, Vitamin E, Vitamin C, Vitamin B1, Vitamin B2, Vitamin B6, and Vitamin B12) [0017].

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

**Claims 51-53 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lee Jae Hack (KR20010069765) hereinafter Hack.**

Hack is taken as cited above.

Hack does not disclose all active ingredients as cited in claims 51-53.

Since Hack discloses addition of active ingredients such as vitamins (vitamins A, B<sub>1</sub>, B<sub>2</sub>, B<sub>6</sub>, C, D, E) and minerals (calcium) to provide consumer with nutrients that are "usually deficient in human bodies", one of ordinary skill in the art would have been motivated to modify disclosure of Hack et al and to add other vitamins and minerals that are deficient in the human body. One of ordinary skill in the art would have been motivated to add minerals and vitamins as recited, since folate, magnesium, selenium and zinc were well known vitamin and mineral supplements. One of ordinary skill in the art would also have been motivated to do so in order to increase dietary value of the beer.

**Claims 53 and 60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Donhowe (US 2003/0134007).**

Donhowe is taken as cited above.

Donhowe does not disclose all active ingredients as cited in claims 53 and 60.

Since Donhowe discloses addition of active ingredients such as vitamins Vitamin A, Vitamin E, Vitamin C, Vitamin B1, Vitamin B2, Vitamin B6, and Vitamin B12 and minerals (iron, calcium, zinc and selenium) to provide consumer with nutritionally beneficial supplements [0014], one of ordinary skill in the art would have been motivated to modify disclosure of Donhowe et al and to add other vitamins and minerals that are also nutritionally beneficial. One of ordinary skill in the art would have been motivated to add minerals and vitamins as

recited, since folate and magnesium were well known vitamin and mineral supplements. One of ordinary skill in the art would also have been motivated to do so in order to increase dietary value of the beverage.

### ***Response to Arguments***

Applicant's arguments with respect to claims 1-22 have been considered but are moot in view of the new ground(s) of rejection.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Vera Stulii whose telephone number is (571) 272-3221. The examiner can normally be reached on 7:00 am-3:30 pm, Monday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

VS

*Steve Weinstein*  
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PRIMARY EXAMINER  
*for*  
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